Exhibit 12

Exhibit 2

OFFICE OF IMPARTIAL CHAIRMAN

-- X

In the Matter of the Arbitration between

New York Hotel & Motel Trades Council

Union,

And

Four Points By Sheraton Manhattan Chelsea,

Employer.

-- X

Case No. HTC#U16-012

Impartial Chairman Ira Drogin

EMPLOYER'S POST-HEARING BRIEF

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Four Points By Sheraton Manhattan Chelsea (the "Hotel or the "Employer") submits this post-hearing brief in support of its position that the Award to Case No 2008-04 (the "Award") is unenforceable, and further, that its response to the New York Hotel & Motel Trades Council's (the "Union's") information request complied with the National Labor Relations Act (the "Act").

I. PRELIMINARY STATEMENT

An unconfirmed arbitration award is without effect, statutes of limitations matter, a hallmark to the Act is the freedom to negotiate contract terms, and a party cannot re-litigate previously decided claims and issues. This case is about honoring these long held and irrefutable legal and equitable principles. The tortured history that exists between the Hotel and the Union (collectively the "parties"), which the Union resuscitated at the Hearing, is a red herring that distracts from the core legal issues at hand.

The Impartial Chairman ("IC") issued the Award on April 14, 2008. The Union has stipulated that it never confirmed the Award. The Award purported to impose the 2006 Industry Wide Agreement (the "2006 IWA") onto the Hotel. Approximately one month after the IC issued the Award, the Union admitted the 2006 IWA was not applicable to the Hotel during litigation before the Southern District of New York (the "Court Litigation") regarding the validity of various awards the IC issued in 2007 certifying the Union as the representative of certain Hotel employees. The Union repeated this admission at various times throughout the Court Litigation. Based on the Union's binding judicial admissions, the Hotel asked the Court to vacate the Award. On September 29, 2014 the court issued an Opinion and Order in which it acknowledged the Union's judicial admission and deemed the 2006 IWA inapplicable to the Hotel. The Second Circuit also found the 2006 IWA irrelevant to the Hotel, again based on the Union's judicial admissions.

The parties commenced negotiations in 2007 after the onset of the Court litigation. The discussions broke off in July 2007 after three bargaining sessions. Over eight years passed before the Union requested to resume negotiations on December 7, 2015. The parties met about one month later on January 5. The Union proposed and the Hotel rejected the IWA as the starting point for negotiations. With no place to turn to extract bargaining leverage, the Union filed a demand for arbitration asking the IC to enforce the stale Award.

Applicable statutes of limitation allowed the Union one year to confirm or take action on the Award, or alternatively, six years to enforce the Award as a contract right. The Union's failure to do so renders the Award unenforceable. Secondly, the IC is subject to National Labor Relations Board ("NLRB" or the "Board") standards. Two federal court decisions have held that the 2006 IWA is inapplicable to the Hotel. The Act does not permit the IC to ignore these judicial determinations and unilaterally set contract terms.

Finally, the Union admitted, the Hotel asked, and the court and Second Circuit acknowledged the 2006 IWA was irrelevant to the Hotel. Equitable principles bar the Union from re-litigating this issue.

Long held legal precedent governing the vitality of arbitration awards and the sanctity of the collective bargaining process as well as equitable principles barring the re-litigation of already decided issues dictate that the IC deny the Union's belated attempt to enforce the Award.

II. THE HOTEL'S PROFFERED ISSUES

ISSUE # 1: Does the unconfirmed Award to Case #U07-375 that was issued on April 14, 2008 remain enforceable? If so, what shall be the remedy?[1]

[1] The Union's proffered issues #2-7 as described in its March 10 correspondence to the IC all hinge on the seminal question of whether the Award is enforceable.

ISSUE #2: Did the Hotel violate the National Labor Relations Act and Addendum IV by failing and refusing to fully comply with the Union's December 7, 2015 Request for Information ("RFI")? If so, what shall be the remedy?

III. FACTUAL BACKGROUND

A. General Background

In February 2003, the owner of the Hotel retained Interstate Resorts & Hotels ("Interstate") to perform certain management functions at the property. On January 15, 2004 Interstate and the Union entered into a four paragraph Memorandum of Agreement (the "Memorandum"). Paragraph 1 bound Interstate to Section 60 and Addendum IV of the 2001 Industry Wide Agreement (the "2001 IWA") as to any properties it currently managed or would come to manage. Paragraph 2 provided that Interstate would be bound to the successor to the 2001 IWA. That successor is the 2006 IWA.

The parties' differences began with a dispute regarding whether the Memorandum authorized the Union to organize the Hotel's employees pursuant to the card check and neutrality procedures described in Addendum IV of the IWA. On January 30, February 16, February 20, and March 6, 2007 the IC issued a series of awards holding *inter alia* that the Hotel was subject to Section 60 and Addendum IV of the IWA, and that the Union represented certain employees at the Hotel following a card count conducted in accordance with the procedures thereto. (the "2007 Awards").[2] *See* U-1-4

On March 23, 2007 the Hotel filed a petition in New York state court to vacate the 2007 Awards. The Union removed the case to the Southern District of New York, citing Section 301(a) of the Labor Management Relations Act as the basis for federal jurisdiction.

[2] The Union's exhibits are hereinafter referred to as U-__."The Hotel's Exhibits are hereinafter referred to as "E-__." Joint Exhibits are hereinafter referred to as "JX-__."

B. Instead of Confirming the Award, the Union Concedes the 2006 IWA Is Inapplicable to the Hotel.

During the midst of the Court Litigation, the IC convened multiple days of hearing to determine if the Hotel had failed and refused to bargain in good faith with the Union. On April 14, 2008 the IC issued the Award, which found *inter alia*:

> Commencing August 31, 2007 the Hotel shall pay all Bargaining Unit employees on its payroll on that date, and those hired thereafter, the minimum hourly wage rates and fringe benefits, including but not limited to contributions to the Union Family Medical Fund, contained in the Collective Bargaining Agreement between the Union and the Wingate Hotel, until the sooner of the execution of a Collective Bargaining Agreement between the Hotel and the Union, or the expiration date of the aforementioned Wingate Hotel Collective Bargaining Agreement.
>
> Except as provided … above, and for the duration set forth . . . above, the Hotel shall be bound by all of the other provisions of the July 1, 2006 Collective Bargaining Agreement between the Hotel Association of New York City, Inc. and the New York Hotel and Motel Trades Council, AFL-CIO (the IWA).
>
> *See* JX-1 at 57-58.

The Union never confirmed the Award. Instead, over the course of the Court Litigation, the Union admitted the Hotel was not subject to the 2006 IWA. The Union's General Counsel testified at a May 8, 2008 deposition that Paragraph 2 of the Memorandum applied only to unionized hotels and not to the Hotel. *See* E-2 at 2-3. The Hotel stipulated that this fact was undisputed in its Rule 56.1 statement in support of its summary judgment motion, and the Union did not contest it. *See* E-3 at 14-15, ¶ 80 -82, see also E-4 at 5. The Union also admitted that it did not seek to apply the accretion portions of Article 60 of the IWA to the Hotel. *See* E-3 at 17,¶ 95; *see also* E-4 at 6. In light of these judicial admissions, the Hotel's post trial brief asked the court to vacate the Award. *See* E-1 at 16.

C. Judicial Determinations Deem the 2006 IWA Inapplicable to the Hotel.

The court conducted a seven day bench trial during 2008. On September 29, 2014 the court issued an Opinion and Order confirming the 2007 Awards (the "Opinion"). The Opinion also explained that the 2006 IWA was "not applicable to [the Hotel]". *See* JX-2 at 11 n.3. The Hotel appealed certain aspects of the Opinion to the United States Courts of Appeals for the Second Circuit. At oral argument in response to questioning from the Second Circuit panel, Union Counsel said that absent an agreement reached during bargaining the Hotel would not be bound to the IWA's terms. As a result, while holding the 2004 MOA subjected the Hotel to Section 60 and Addendum IV of the 2001 IWA, the Second Circuit also reiterated that the 2006 IWA was inapplicable to the Hotel. *See* JX-3 at 3 at n.1 ("Because the parties agreed before the district court that paragraph 2 did not bind [the Hotel], operating instead only as to hotels that were already unionized at the time, we do not rely on the 2006 IWA.")

D. For Almost Nine Years, the Union Did Not Request to Bargain.

During 2007, the parties met three times and spoke over the phone once to discuss the terms of a contract. *See* JX-1 at 10. On August 31, 2007 the Union's President sent a letter to a Hotel representative asking that the parties arrange meeting dates. *See id.* at 11. The parties did not meet. *Id.* On December 7, 2015 after lying dormant for over eight years, the Union formally requested to resume bargaining. *See* U-8. The parties met on January 5, 2016.[3] Despite previous judicial admissions to the contrary, the Union claimed that the Award mandated IWA wage and benefit rates to be the status quo ante for negotiations.

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[3] The parties have since met on March 10, 24 and 30. The parties have agreed to language regarding the following items: supplies for employees, translation services, protecting employee privacy, and maintaining a healthy and safe work environment. The Hotel has made a proposal which includes *inter alia* a five percent (5%) wage increase for employees. The Union has continued to insist that the economic provisions contained in the IWA be the baseline for negotiations.

E. **The Hotel Complied with the Union's Information Request.**[4]

The Union sent the RFI to the Hotel in conjunction with its request to resume negotiations. *Id.* In addition to payroll and policy related information, the Union is seeking data dating back to 2007 to help it quantify backpay due under the expired Award. *Id.* On December 28, January 4 and February 1 the Hotel provided information that collectively addressed all the policy and payroll items the Union requested. *See* U-11, 12 and 14.

F. **The Union's Belated Arbitration Demand**

On January 11, the Union filed a demand for arbitration (the "Arbitration Demand") based in part on the Hotel's alleged "fail[ure] and refus[al] to honor obligations under [the Award] including but not limited to employee wages and benefits, instituting unilateral changes." *See* JX-4. At the Hearing, the Union acknowledged it was not raising a surface bargaining claim.

The Union wants to circumvent the applicable statute of limitations and breathe new life into the Award to enhance its bargaining leverage. There is a litany of legal and equitable reasons why the IC should deny the Union's attempt to resuscitate the stale Award.

IV. ARGUMENT

ISSUE #1:

1. The Arbitration Demand is Time Barred.

A. **The Union's failure to confirm the Award renders it unenforceable.**

An arbitration award that is not filed and confirmed in an appropriate court is without effect. *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989). New York Civil Practice Law and Rules (CPLR) § 7510 limits the period for confirming an arbitral award to one year. ("the courts shall confirm an award upon application of a party made within one year after

[4] The Hotel is addressing the outstanding items except for employees' home and e-mail addresses, and telephone numbers. The IC has found the Hotel is required to provide this identifying information. The Union has asked that the IC issue this order in conjunction with his ruling on each of the issues discussed herein.

its delivery to him"). The solemnity of this one year limitation period is evidenced by CPLR § 215(5), which also limits an action on an arbitration award to one year. *See Protocom Devices v. Figueroa*, 173 A.D.2d 177, 178, 569 N.Y.S.2d 80, 81 (1st Dep't 1991) (staying arbitration demand when there were no new facts precipitating the demand except for *Figuerora's* failure to confirm the original award in a timely fashion). Awards that resolve the underlying controversy are final and definite for purposes of CPLR §75. *Snyder-Plax v. Am. Arbitration Ass'n*, 196 A.D.2d 872, 874, 602 N.Y.S.2d 64, 66 (2nd Dep't 1993).

The sixty plus page Award fully addressed the Union's grievance that the Hotel was skirting its bargaining obligations. The Union elected to not confirm the Award within the mandated period, and must now live with the fatal consequences of this decision. *See New York Hotel & Motel Trades Council v. Hotel St. George*, 988 F. Supp. 770, 782 (S.D.N.Y. 1997) (explaining the Union was left with the consequences of neglecting to petition to confirm an award in a timely fashion).

The IC's retention of jurisdiction in Paragraph 5 of the Award's relief section to resolve disputes concerning amounts due to bargaining unit employees "should" they arise does not toll the one year statute of limitations period. *See* JX-1 at 58. *Morgan Guar. Trust Co. of New York v. Solow*, 114 A.D.2d 818, 823, 495 N.Y.2d 389, 393 (1st Dep't 1985), *aff'd*, 68 N.Y.2d 779, 498 N.E.2d 147, 506 N.Y.S.2d 147 (1986). (An arbitrator's reservation of jurisdiction to resolve disputes which may arise to effectuate an award's remedies does not mean that an award is indefinite or non-final). An award that resolves the controversy submitted for arbitration is ripe for judicial intervention under CPLR §75. *Civil Serv. Employees Ass'n. v. Cty. of Nassau*, 305 A.D.2d 498, 496, 759 N.Y.S.2d 540, 541 (2nd Dep't 2003). In *Civil Serv* an arbitrator ruled an employer violated a collective bargaining agreement's prohibition against using outside contractors. *Serv. Employees Ass'n.*, 305 A.D.2d 498. The employer argued the award lacked finality because it did not calculate backpay due to employees. *Id.* The court disagreed holding that the arbitrator's ruling resolved the underlying issue –whether the employer was permitted to subcontract- that was submitted to arbitration. *Id.*

The same is true here. One of the questions submitted to the IC was "Has the Hotel violated . . . [the IWA] by refusing to bargain with the Union concerning the terms and conditions of employees employment . . ." *See* JX-1at 1. The Award thoroughly answered this question. It did not leave any matters vis-à-vis the Hotel's bargaining obligation open for contention. All that remained was quantifying backpay based on hours employees worked and the wages and benefits provided under the 2006 IWA. The mere possibility of a dispute over these calculations did not mandate that a second hearing take place. *Snyder-Plax v. Am. Arbitration Ass'n*, 196 A.D.2d 872, 874, 602 N.Y.S.2d 64, 66 (2nd Dep't 1993) (Not fixing interest rate accrual rates only raised the possibility of a controversy; it did not disturb the award's finality). Indeed, to invoke Paragraph 5 and trigger a question concerning amounts due to employees under the Award, the Union needed to first take action on the Award in a timely fashion. The Union failed to do so. It cannot use the IC's jurisdiction over remedial issues unrelated to the merits of the grievances raised with the IC to undo its inaction.

B. The statute of limitations for the underlying conduct has expired.

Assuming *arguendo* the one year statute for confirming and actions on an award is not dispositive (which it is) the IC still cannot revisit the subject of the Award because the statute of limitations for the underlying conduct has passed. CPLR § 7502 provides "[i]f, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration." Simply put, a claim barred in court is also barred in arbitration.

An unconfirmed arbitration award provides the Union with, at most, contract rights. *See Floransynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) ("An unconfirmed award is a contract right that may be used as the basis for a cause of action"). An action in federal court to enforce the Award as a contract would be subject to the most appropriate state statute of limitations. *See, e.g., O'Hare v. Gen. Marine Transp. Corp.*, 740 F.2d 160, 167 (2d Cir. 1984). Under New York law, this is six years. *See* CPLR §213 (six year statute of limitations for breach of contract cases). Accrual of a contract claim occurs at the alleged breach. *T & N PLC v. Fred S. James & Co. of New York*, 29 F.3d 57, 59 (2d Cir. 1994). The Hotel's alleged breach of the Award occurred in 2008 – more than eight years before the Union filed the Arbitration Demand. Accordingly, the permitted period for the Union to seek to enforce the Award as a written contract has lapsed.

Furthermore, there is a six month statute of limitations for unfair labor practice claims. *See* 29 U.S.C. § 160(b). All the underlying conduct at issue occurred nearly a decade ago, far outside this time period.

The Union's likely reliance on the continuing violation doctrine does not breathe any life into the Award. The continuing violation doctrine provides an exception to the normal knew-or-should-have-known accrual date for statutes of limitations. *Harris v. City of New York*, 186 F.3d 243, 248 (2d Cir. 1999). However, "[a] continuing violation is occasioned by continuing unlawful acts, not continued ill effects from the original violation." *John Doe v. Moe Blake, et al.*, 809 F.Supp. 1020, 1025 (D.Conn. 1992) (*quoting Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir.1981)).

The Arbitration Demand asks the IC to enforce the obligations under the Award. *See* JX-4. The Union has not alleged any new unlawful acts. Its claim is predicated solely on the Hotel's purported contract breach. "The mere fact that [employees] may continue to suffer damages . . . does not alter the fact that the Hotel's unlawful conduct, if any, occurred [more than six years] before the [Arbitration Demand] was filed." *Breitman v. Xerox Educ. Servs.*, LLC, No. 12 Civ. 6583, 2013 WL 5420532, at *5 (S.D.N.Y. Sept. 27, 2013) (dismissing breach of contract claim brought outside of the statute of limitations period where the defendant's alleged breach was not applying the alleged contracted for benefit). As such, the continuing violations doctrine does not rescue the Union from failing to enforce the Award as a contract right.

The Union's assertion that the Hotel's alleged "refusal to bargain" is a continuing act can also be easily cast aside. Once negotiations started, the Union was required to act with diligence to preserve its request to bargain. *Goodyear Tire & Rubber Co and Teamsters Local* 920, 312 N.L.R.B. 674, fn.1 (1993) (where there was discussion but no agreement on future date for negotiations, "prudence dictates that the Union follow up on its demand.") Due diligence includes an "obligation on the part of a union to ensure that its demand to bargain is continuous". *AT&T Corp.*, 337 N.L.R.B. 689, 692-693 (2002).

During the Court Litigation, the parties conducted at least three bargaining sessions with the last session occurring on July 19, 2007. *See* JX-1 at 10. Despite expressing a desire to continue negotiations and build upon the momentum generated, the Union waited almost nine years until to request another date for bargaining. *See id.* at 10 and 11([Ward] expressed the opinion that excellent progress had been made; Ward asked [the Hotel] to set up meeting dates to continue collective bargaining). The Union's excuse that the Court Litigation relieved it from pursuing negotiations ignores the obvious: The parties had multiple bargaining sessions after the

Hotel first sought to vacate the 2007 Awards. Just as the Court Litigation did not stop the parties from commencing negotiations, it did not impede the Union from asking the Hotel to continue bargaining. Even after the Opinion confirmed the 2007 Awards, the Union still waited for more than a year to ask the Hotel to return to the bargaining table. [5]

Between mid-2007 and late 2015 the Union made no legitimate effort to pursue negotiations.[6] The Union's abandonment of negotiations fails the diligence standard the Act requires to preserve a bargaining request.

2. The Act does not permit the IC to impose the 2006 IWA in contravention of two federal court decisions holding the 2006 IWA does not apply.

The IC is subject to NLRB standards. The Act bars the NLRB from setting contract terms as a remedy. *See H. K. Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970); *Cooper Thermometer Company v. N.L.R.B.*, 376 F.2d 684, 690 (2d Cir. 1967)("a sanction for refusal to bargain that would treat the guilty party as if he had agreed to what the other party demanded" fails to recognize that "the obligation to bargain does not compel either party to agree.")

In *H. K. Porter*, an employer unlawfully refused to bargain over a "dues checkoff" provision. *H.K. Porter*, 397 U.S. at 100-01. Based on the employer's other contracts, along with its pay practices, the Board concluded the employer would have agreed to the dues check of provision but for its bad faith. *Id.* The *H.K. Porter* Court reversed, not because the Board's factual inference was unreasonable, but because the remedial powers of the Board are "limited to

[5] The RFI references an October 2014 invitation to the Hotel to bargain. There is no record of this invite. Even if the invitation occurred, whether the Union waited slightly more than seven or almost nine years is irrelevant to the fact that it waited an inordinate amount of time to renew its 2007 bargaining request.

[6] At Hearing, the Union claimed it requested to resume negotiations prior to December 2015. The Union has not presented a scintilla of evidence to support this self-serving proposition. The Union's General Counsel was present at the Hearing and did not testify to any effort on the Union's part to pursue negotiations. The IC should infer that his testimony would have been adverse to the Union. Elkouri & Elkouri, How Arbitration Works (6th ed. 2003) at 381-382. (When a witness is available to a party and in a position to provide informed testimony, but is not called, an arbitrator may infer that the testimony of the witness would be adverse to the party who chose not to call the witness).

carrying out the policies of the Act itself," and that "[o]ne of these fundamental policies is freedom of contract." *Id at* 108. (citations omitted); *See also Truserv Corp. v. N.L.R.B.*, 254 F.3d 1105, 1116 (D.C.Cir. 2001) ("the Board relied on its intuitive belief that, upon further bargaining, each side would have made additional concessions ... [The Board was wrong, because] the parties remain in control of their negotiations, and each party, not the Board, determines at what point it ceases to be willing to compromise.").

The Award found the Employer failed and refused to bargain in good faith. The IC reasoned the imposition of the 2006 IWA was appropriate to restore the status quo which existed before the Employer committed this act. *See* JX-1 at 56. This reasoning collapses in the aftermath of two federal court decisions that have held the 2006 IWA was inapplicable to the Hotel. Applying the 2006 IWA notwithstanding these decisions would wrongly create a fictional baseline for bargaining – not restore any terms which existed prior to the unfair labor practice that the IC found occurred.

Further, with the applicability of the 2006 IWA no longer in doubt, the Award's reliance on GC Memorandum 07-08 warrants reconsideration. *See id.* The GC Memo authorized NLRB Regional Directors to consider the following additional remedies against employers who attempt to forestall bargaining in first contract cases.: (1) Requiring bargaining on a prescribed schedule; (2) Periodic reports on bargaining status; (3) A minimum six month extension to the certification year; and (4) reimbursement of bargaining costs. *See* Memorandum GC07-8.

The GC Memo does not authorize much less even suggest that the Board can unilaterally set contract terms. Moreover, the Board has not construed the GC Memo as expanding its remedial powers. *HTH Corporation,* 361 N.L.R.B. No. 65, 2014 WL 5426174 (Oct. 24, 2014)

(Refraining from setting contract terms despite an employer's ten year history of violating the Act).

The Act affords the Hotel the contractual right to reject the IWA. Two federal courts have determined that the 2006 IWA is inapplicable to the Hotel. Based on these judicial determinations, regardless of any prior bad acts the Hotel has arguably committed, the Act prohibits the IC from unilaterally setting contract terms and infringing upon the sanctity of the collective bargaining process.

3. Whether or not the Employer sought to vacate the Award is irrelevant to the Award's fatality due to the Union neglecting to seek confirmation.

The Union wrongly relies on *Local 802, Associated Musicians of Greater New York v. The Parker Meridien,* 145 F.3d 85 (2d Cir. 1998) for the proposition that the Award has a pulse due to the Hotel not moving for vacatur. A party who participated in arbitration or was served with notice of intention to arbitrate has ninety days to vacate an arbitration award while the prevailing party has one year to confirm an award. CPLR § 7510, 7511.[7] In *Parker Meridien*, a union moved to confirm an award ninety-one days after its issuance. 145 F.3d at 89. The court held *Parker Meridien's* defense that the arbitrator lacked jurisdiction was time barred because "grounds for vacating an arbitration award may not be raised as an affirmative defense" in an action to confirm the award outside the permitted ninety day window for vacatur." *Id.*

The facts at hand are inapposite. The Award is unconfirmed. It is non-sensical to interpret *Parker Meridian* as disturbing the prescribed statute of limitations for confirmation. It is axiomatic that the Hotel could not have plausibly claimed the Award was a nullity after ninety

[7] Grounds for vacatur are (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of [CPLR § 75], unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. *See* CPLR § 7511.

days when the Union still had 266 days to move to confirm. Accordingly, whether or not the Hotel moved to vacate is wholly irrelevant to the enforceability of an unconfirmed award.

Parker Meridian also does not bar the Hotel from claiming that the Award wrongly imposed the 2006 IWA. *Trustees of the International Union of Operating Engineers Local 30 Benefit Funds v. Nyack Hospital*, 975 F.Supp.2d 365 (S.D.N.Y. 2013)(statute of limitations on raising grounds to vacate an arbitration award does not apply when a defendant is a non-signatory to the relevant agreement purporting to grant the plaintiff the right to arbitrate the dispute).[8]

4. Equitable principles defeat the Arbitration Demand.

The Union could have filed the Arbitration Demand at any time after the Award's issuance and the Employer's alleged breach. It waited over eight years until bargaining resumed and the Hotel rejected the IWA. It is plainly obvious the Union pursued this course to obtain bargaining leverage. There are a host of equitable reasons why the IC should honor the governing limitations periods and the Union's own judicial admissions over allowing the Union to use his office to shift the bargaining pendulum.

A. Claim and Issue Preclusion Doctrines bar the Union from using the IC to re-litigate whether the 2006 IWA is applicable to the Hotel.

In seeking to enforce the Award, the Union asks the IC to impose the 2006 IWA in full against the Hotel, despite two federal court decisions holding that the 2006 IWA does not apply. Both claim and issue preclusion bar the Union from advancing this argument further. *In re Kassover*, 257 Fed. Appx. 339 (2d Cir. 2007) (claims that were previously litigated were barred from arbitration); *Aircraft Braking Sys. Corp. v. Local 856, UAW*, 97 F.3d 155, 160 (6th Cir.

[8] The "non-signatory" exception to *Parker Meridian* is based upon the premise that a party cannot be required to arbitrate a dispute that he has not agreed is subject to arbitration The Hotel is not a party to the 2006 IWA. The same freedom of contract principles that preserve the non-signatory argument entitle the Hotel to claim that the Award violates its contractual rights.

1996) (holding that arbitrator's decision to reconsider whether binding contract existed after federal court had found that it did "was in excess of his authority and in disregard of the law"); *Ernst & Young, LLP v. Tucker*, 940 So. 2d 269 (Ala. 2006) (collateral estoppel precluded the arbitration panel from considering issues that had been adjudicated in litigation prior to moving to compel arbitration).

Collateral estoppel (i.e. issue preclusion) provides that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979). The elements of issue preclusion are: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998).

The Court Litigation and this arbitration both raise the seminal issue of whether the Hotel is bound to the 2006 IWA. The Court Litigation reached a decision on that issue on the merits (after the Union conceded the inapplicability of the 2006 IWA in binding judicial admissions), and the Union had a full and fair opportunity to litigate that issue. The issue was necessary to the ultimate judgment because, without the Union's concessions concerning the inapplicability of the 2006 IWA, the Second Circuit could not have concluded that the 2007 Awards did not violate the bar on pre-recognition bargaining. *See* JX-3 at 6-7.

Claim preclusion also bars the Union's arguments. Claim preclusion applies if (1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action. *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000). The Court Litigation was decided on the merits and involved the same parties to this matter. It also involved the "same transactions or occurrences"— and the Union's contention that the 2006 IWA should apply through the 2008 Award could have been and was raised in the Court Litigation. *Sadler v. Brown*, 793 F. Supp. 87, 90 (S.D.N.Y. 1992); *see also Tovar v. Tesoros Prop. Mgmt., LLC*, 119 A.D.3d 1127, 1129, 990 N.Y.S.2d 307, 309 (3rd Dep't 2014) (barring claim for wages because that claim could have been raised in the prior action). Because all elements are met, the Union is foreclosed from advancing the claim that the Hotel is bound to the 2006 IWA.

The holdings of two federal courts regarding the 2006 IWA are binding on the IC. The IC should not permit the Union to renege on its judicial admission that the 2006 IWA was inapplicable to the Hotel.

B. The IC has become Functus Officio.

Functus Officio dictates that once arbitrators have fully exercised their authority to adjudicate the issues submitted to them, their authority over those questions is ended absent agreement by the parties to re-determine those issues. *T.Co Metals*, 592 F.3d 329, 342 (2d Cir. 210)(quoting *Trade & Transp., Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir.1991) As described *supra*, the Award fully addressed the Union's grievances. The Union has not presented any reason for the IC to reopen the eight plus year old Award. *Trade & Transp., Inc.* 931 F. 2d at 195. (Arbitrators become functus officio when they have decided all issues submitted for arbitration); *Bd. of Managers of Diplomat Condo. v. Bevona*, 160 A.D.2d

645, 647, 559 N.Y.S.2d 262, 264 (1st Dep't 1990) (the issue of an award's viability should have been litigated on a timely motion to confirm or modify that award.)[9]

C. **Laches Bars the Arbitration Demand.**

Laches applies if (1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay. *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998). Prejudice is established by showing an injury, change of position, loss of evidence, or some other disadvantage resulting from the delay. *Resk v. City of New York*, 293 A.D.2d 661, 662 , 741 N.Y.S.2d 265, 266 (2nd Dep't 2002).

Courts look to the analogous statutes of limitations as an important factor in the application of laches. *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 191 (2d Cir. 1996); *Lazare Kaplan International, Inc., a Delaware Corporation, Plaintiff/Counter-Defendant, v. Photoscribe Technologies, Inc., et al.* No. 1:06CV04005, 2008 WL 742970 (S.D.N.Y. Feb. 11, 2008) (the **dispositive consideration** concerning the laches defense to breach of contract claims is whether the action was brought **within** the mandated six year period) (emphasis added).

The Arbitration Demand is time barred. The Union has not offered any credible excuse for waiting close to nine years to act on the Award. The Hotel will incur multiple millions in backpay if it is bound to the 2006 IWA retroactively. Since the Hotel had no reason to believe the Union was not being forthcoming with the court, the Hotel could not have reasonably accrued for such an expense. Further, the Hotel would incur significant increases in costs

[9] Any reliance on *Greystone Hotel Greystone Corp. v. NY Hotel & Motel Trades Council*, 902 F. Supp. 482 (S.D.N.Y. 1995) is misplaced. In *Greystone*, the court affirmed that the IWA allowed the IC to reopen an award for "good cause." *Hotel Greystone*, 902 F. Supp. At 485. The "good cause" was confusion over the issue originally submitted for arbitration and newly discovered evidence. *Id.* at 484. In the instant matter, the Union wants to reopen the Award to erase its failure to confirm or take action on the Award in a timely fashion. If the Union had done so, the Union could have enforced the Award without asking the IC for a life vest. The Union's transparent attempt to evade the statute of limitations does not constitute "good cause."

prospectively. These increases will inevitably force the Hotel to raise room rates. The higher prices will impact how the Hotel markets itself to potential customers.

For nine years, the Hotel rightfully relied on the Union's admissions that it was not bound to the 2006 IWA. The Hotel will be prejudiced if the Union is permitted to renege on its binding concessions to the court. *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (affirming that Conopco's five year delay in bringing a claim unduly prejudiced Campbell's marketing strategy); *Lingenfelter v. Keystone Consol. Indus., Inc.*, 691 F.2d 339, 342 (7th Cir. 1982) (Where an employee waited nine years to bring a claim seeking reinstatement, wages paid and promotions awarded to alternate employees were elements of prejudice). With all the elements satisfied, laches bars the Arbitration Demand.

ISSUE #2:

5. The Hotel Has Fulfilled Its Duty to Provide Information Relevant to Bargaining.

An employer's duty is to supply information which the bargaining representative requests and needs for the performance of its duties. *N.L.R.B. v. Acme Industrial*, 385 U.S. 432, 435-436 (1967). At Hearing, the Union acknowledged that the Hotel has provided all information requested, except for data dating back to 2007 and punch records over the past twelve months.

The Hotel supplied an earnings report showing the total number of hours worked and/or paid over the past twelve months as well as employees' current hourly rates. *See* U-11 and 14. These documents together contain all the information that would be found and extrapolated from a punch report.

The Union has all current payroll data it has requested. Since the Award is unenforceable - no backpay is due - and the request for information dating back to 2007 is irrelevant. *See*

Anthony Motor Co., Inc., 314 N.L.R.B. 443, 449 (1994) (holding that the employer is obligated to furnish information relevant to the union's performance of its collective bargaining duties).

V. CONCLUSION

Unconfirmed arbitration awards are without effect. Since the Award's issuance, two federal courts have held that the 2006 IWA is inapplicable to the Hotel. The Act prohibits the IC from ignoring these decisions and intruding upon the collective bargaining process by setting contract terms. The IC should honor the statute of limitations governing the viability of arbitral awards. He should also not permit the Union to escape its own judicial admissions. The Hotel has provided the Union with information relevant for bargaining.

For the foregoing reasons, the Arbitration Demand should be dismissed.

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